TAN HOE KOCK & ANOR.

v.

ALI AKARBARA MANGUDIN & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
R.K. NATHAN JC
[SUIT NO: D5-22-585-1995]
17 JULY 1996

CIVIL PROCEDURE: *Particulars - Further and better particulars - Whether particulars to be ordered before discovery - Fiduciary relationship between parties - Whether particulars to be deferred until after discovery - Whether a general rule.*

CIVIL PROCEDURE: *Particulars - Further and better particulars - Whether particulars to be ordered before discovery - Allegation of breach of trust and misappropriation against defendants - Plaintiffs failing to file affidavit in reply stating grounds for believing that acts of misappropriation or breach of trust were perpetrated - No specific charges against defendants in statement of claim.*

CIVIL PROCEDURE: *Particulars - Further and better particulars - Application for - Rules of the High Court 1980, O. 18 r. 12(1) - By way of letter first - Application under O. 18 r. 12(3) - Whether application should be by way of O. 25 r. 7 - Consent - Particulars obvious and incontestable.*

This was an application by the defendants pursuant to O. 18 r. 12(3) of the Rules of the High Court 1980 ('the RHC') for further and better particulars in respect of certain allegations in the plaintiffs' statement of claim. Counsel for the defendants submitted that further details in respect of the alleged breach of trust and misappropriation and the assets involved ought to be particularised in order to give clarity to the issues in dispute and to enable the defendants to reply to these issues. The plaintiffs contended that the particulars sought were within the knowledge of the defendants, and undertook to provide the particulars after discovery. Thus, the main issue before the Court was whether the particulars should be provided before or after discovery.

Held:

[1] There is no general rule that particulars will be refused until after discovery if there is a fiduciary relationship between the parties. It is clear that each case has to be considered on its own facts and merits and the special circumstances surrounding it.

[2] The plaintiffs had not filed any affidavit in reply to state their grounds for believing that acts of misappropriation or breach of trust were perpetrated. Neither had the plaintiffs given any instance of such acts which led them to allege as they did. Nor were there any specific charges made against the defendants in the plaintiffs' statement of claim. Consequently, this was a case in which particulars ought to precede discovery.

[3] There was no evidence of any want of probity on the part of the defendants to enable the Court to exercise its discretion in favour of the plaintiffs. On the other hand, there were insufficient particulars to enable the defendants to know the basic charges against each of them. It is expedient and highly desirable that particulars are requested and supplied at this stage instead of at the summons for directions stage as both parties will then be able to reassess their pleadings and have sufficient time to make any necessary amendments.

Per curiam

[1] Particulars ought not to be given in every case as of right. It is a discretionary right vested in the Courts to be exercised upon a study of the pleadings and the averments in the affidavit in support of the application for particulars.

[2] A party seeking particulars should do so pursuant to O. 18 r. 12(1) of the RHC. He should, of course, make a request for the particulars sought by way of a letter first. The opposite party can then furnish the particulars by way of Form 35 of the RHC. If the opposite party refuses to respond to the letter, then the party seeking the particulars can file an application pursuant to O. 18 r. 12(3) of the RHC together with a supporting affidavit giving reasons for seeking such particulars. A party seeking particulars ought not to seek such particulars by way of O. 25 r. 7 of the RHC unless by consent or unless the particulars sought are so obvious as to be incontestable.

[Defendant's application allowed. Particulars preceding discovery ordered.]

Cases referred to:
Lim Kee Tiak v. Lim Kee Tian [1987] 2 MLJ 528 ***(refd)***
Millar v. Harper [1888] 38 Ch D 110 ***(refd)***
Ross v. Blakes Motors, Ltd. [1951] 2 All ER 689 ***(refd)***
Waynes Merthyr Co. v. Radford & Co. [1896] 1 Ch 29 ***(refd)***
Arab Monetary Fund v. Hashim and Others (No. 2) [1990] 1 All ER ***(refd)***
Leal v. Dunlop Bio-Processes International Ltd [1984] 1 WLR 874 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 12(1)(a), 12(3), O. 25 r. 7(1)
Rules of the Supreme Court [UK], O. 19 r. 7

Other source referred to:
Odgers' Principles of Pleading And Practice, 23rd Edn., p. 192

For the plaintiff - Pores Royan; M/s. Shook Lin & Bok
For the 1st - 3rd defendants - M. Manoharan (V. Somaskanthan with him); M/s. Karpal Singh & Co.
For the 4th - 11th defendants - H.K. Ling; M/s. Cheang & Ariff

JUDGMENT

Kamalanathan Ratnam JC:

The plaintiffs, husband and wife, had a controlling interest in two companies, namely PN Consolidated Sdn. Bhd. and Metroknit Sdn. Bhd. (hereinafter called 'the group'). The 1st defendant was at all material times the 1st plaintiff's personal assistant and was also the security manager of the group. The 2nd defendant is the wife of the 1st defendant and together were the only shareholders of the 3rd defendant. The 4th and 5th defendants were at all material times the only directors of another company called Weatherwell Corporation Sdn. Bhd. ('Weatherwell'). The 6th and 7th defendants were directors of and the agents or servants of the 8th defendant. The 9th defendant, being designers and traders in fashion garments was controlled by the 6th and 7th defendants who were its substantial shareholders. The 10th and 11th defendants are companies incorporated in Malaysia. The 1st to 3rd defendants were represented by one Counsel whilst the 4th to 11th defendants were collectively represented by another.

The 4th to the 11th defendants filed their defence on 10 January 1996, but before delivering defence, by a letter dated 27 December 1995 they applied for further and better particulars of some of the matters alleged in the statement of claim. On 22 January 1996, the plaintiffs filed an answer to the request for further and better particulars of the statement of claim. Therefore, the issue of whether particulars would be ordered before the defendants deliver their defence does not arise here. Being dissatisfied with one of the answers provided, the 4th to 11th defendants took out a summons in chambers (Encl. 15) pursuant to O. 18 r. 12(3) of the Rules of the High Court 1980 (RHC). The particulars sought were as follows:

> 1) Bahawa plaintif-plaintif, dalam masa tujuh (7) hari dari tarikh perintah ini, menyampaikan butir-butir berkenaan dengan penyalahgunaan, pecah amanah ke atas wang dan/atau lain-lain aset beberapa buah syarikat dalam kumpulan itu seperti yang dinyatakan dalam perenggan 13.25 pernyataan tuntutan

dalam ini kepada defendan ke-empat hingga ke-sebelas dengan menyatakan butir-butir penyalahgunaan dan/atau pecah amanah seperti yang diperkatakan, tarikh dan tempat di mana penggelapan dan/atau pecah amanah seperti yang diperkatakan itu dilakukan, menyatakan butir-butir wang dan lain-lain aset yang dipersoalkan dan menyatakan butir-butir beberapa buah syarikat yang dipersoalkan;

2) Bahawa jikalau plaintif-plaintif gagal menepati perintah untuk perenggan 1 di atas, dengan gagal menyampaikan butir-butir selanjutnya dan lebih baik seperti yang diperintahkan, perenggan 13.25 pernyataan tuntutan dibatalkan; dan

3) Bahawa kos untuk permohonan ini dikoskan dalam kausa.

Paragraph 13.25 of the statement of claim referred to in encl. 15 above states as follows:

From the time the 1st defendant and his co-conspirators had wrested control of the group from the plaintiffs, they and in particular the 1st and/or the 4th and/or the 5th defendants have misappropriated and/or committed breach of trust of moneys and other assets of various companies in the group in particular of Weatherwell, Shirtmakers and Country Road;

The application for further and better particulars as embodied in the 4th to 11th defendants letter was as follows:

... particulars of the misappropriation, alleged breach of trust and assets of various companies in the group, stating the details of misappropriation, the date on which and the place at which the alleged breach of trust has been committed, stating the details of the other assets in question.

The plaintiffs' solicitor's reply with which the 4th to 11th defendants were dissatisfied with is as follows:

The particulars sought are within the knowledge of the defendants and the plaintiffs will seek discovery of the same at the appropriate time.

In support of his request for the said particulars Mr. Ling for the 4th to 11th defendants referred me to *Lim Kee Tiak v. Lim Kee Tian* [1987] 2 MLJ 528. In that case the plaintiff was claiming as *administrator de bonis non* of one Chew Hwee (with aliases) who at the time of her death owned some lands. The defendant was a donee of a power of attorney and had after revocation by the death of the donor transferred the said lands to two persons and the transfers were done fraudulently, as alleged by the plaintiff. In the defence the defendant claimed that the deceased, Chew Hwee (with aliases) held the same lands in trust for the defendant who was the beneficial owner. The defendant did not state whether the trust was by deed or oral; he merely used the word 'trust'. The plaintiff then applied for further and better particulars

which the learned SAR refused and hence the appeal before the learned Judge. Mustapha Hussein J held as follows:

> The principles underlying applications for further and better particulars are to be found under functions of particulars in any *White Book.* In any pleading a certain amount of details are obviously necessary not only to ensure clearness but also to prevent surprise to the other party and to narrow down the real issues or points in dispute.
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> In our case, the simple word 'trust' is not that clear. It could mean oral, by deed or even constructive. Reviewing all the authorities, this Court is of the view that the defendant should give further and better particulars, not only of the creation of the trust but also the properties included in the said trust. Moreover there is nothing wrong in disclosing the particulars as it would save time and expense. It will, in no way at all, prejudice the defendant. On the other hand, it will provide clarity to the issues involved.

His Lordship thus allowed the appeal with costs.

Mr. Ting then referred me O. 18 r. 12(1)(a) of the RHC which reads as follows:

> 12(1) Subject to para. (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) particular of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and ... .

He thus submitted that in accordance with the said sub-rule and the case cited, particulars in respect of the breach of trust and instances of misappropriation as alleged, details as to the moneys and other assets that were allegedly misappropriated and particulars relating to the various companies involved ought to be particularised in order to provide clarity to the issues in dispute and to enable the defendants to reply to these issues.

In reply Mr. Royan submitted that since his clients had no control over the group, they had no knowledge as to exactly what had happened.

In *Odgers' Principles of Pleading And Practice* 23rd Edn., at p. 192, the learned authors stated as follows:

> It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary will try to make against him, which may be something very different from the true facts of the case. His opponent may know more than he does; in any event it is well to bind him down to a definite story. Particulars will be ordered whenever the master is satisfied that without

them the applicant cannot tell what is going to be proved against him at the trial. But how his opponent will prove it is a matter of evidence of which particulars will not be ordered.

Based on the above, and the clear words of O. 18 r. 12(1)(a) of the RHC, it would appear to me that the plaintiffs would have to supply the particulars. The crux of the matter here however is whether such particulars are to be supplied **before or after discovery**. It would appear that the plaintiffs' solicitor's view is that the particulars ought to be ordered only after discovery whereas Counsel for the defendants say that it is imperative that his clients be supplied with the details now.

Counsel for plaintiffs further submitted that the documents relating to the said companies were with the police and it was not denied by the defendants that the 1st defendant has indeed been charged by the police in connection with the affairs of the group.

Mr. Royan referred me to *Millar v. Harper* [1888] 38 Ch D 110 where the Court of Appeal held that where the defendant had means of knowing the facts in dispute and the plaintiff had not, the defendant was not entitled to particulars until after he had given discovery. The facts in *Millar's* case had to be considered. The plaintiffs, who were the executors of a married woman, sued her husband to establish that a quantity of the furniture and other chattels comprised in an inventory which had been of the goods in the defendant's house, belonged to the separate estate of the wife. The husband applied for particulars of demand showing which chattels they claimed. The Court held that the application ought to stand over till the husband had made an affidavit as to which of the articles belonged to the wife.

In reply Mr. Ting re-emphasised the applicability of O. 18 r. 12(1)(a) and the need for specifics. He argued that if the plaintiffs had no knowledge, then they ought not to make such a plea. The facts in *Millar's* case are unlike those in the present case. Allegations of breach of trust had been made and therefore there ought to have been a basis for such an allegation. That is what the defendants want. The basis for such an allegation.

In *Ross v. Blakes Motors, Ltd.* [1951] 2 All ER 689, the plaintiff's statement of claim alleged that it was a term of the agreement that the defendants should deliver the car to customers in strict sequence and rotation in relation to the dates of orders for cars placed with them, and that, in breach of their agreement, the defendants had delivered cars to persons who had placed their orders after the plaintiff had placed his order. Before delivering their defence the defendants asked for particulars of this allegation. The plaintiff gave particulars of one such instance and reserved the right to add to the particulars

after discovery. The defendants applied to the Master under RSC O. 19 r. 7, for an order for particulars of all the persons (other than the person of whom particulars had been given) to whom the plaintiff alleged cars had been delivered otherwise than in strict rotation, or, alternatively, for an order that the allegation in the plaintiff's statement of claim should be struck out or be limited to the single case of which the plaintiff had given particulars.

In his judgment Jenkins LJ set out the defendants' submission at pp. 692-693, which is not totally unlike those in this instant case, *viz.*, "the plaintiff should be ordered at once to state his case with sufficient particularity, otherwise he will have gained an advantage by making his fishing allegation. If he can postpone the date when particulars are ordered against him until after he had discovery, he may be able, if he is lucky, to construct some sort of cause he has not got now by means of a roving examination of the defendants' books. Counsel also says that, until they have particulars, the defendants do not know what case they have to meet and are so much in the dark about it that they will not be able to put in a proper defence. He does not say that the statement of claim is impossible to plead to, but he says it is a difficult matter to do justice to the defence with the statement of claim as it stands."

At pp. 695-697, his Lordship held as follows:

> In my view, that allegation (that the cars had not been delivered in strict rotation) cannot fairly be classed as a purely fishing allegation. There is the relation of vendor and purchaser between the parties. The plaintiff cannot have any knowledge of the internal management of the defendant's affairs... . The details of that allegation, if it be well-founded, are, of course, eminently matters within the knowledge of the defendants and the defendants alone. ... it seems to me that this is not a case in which it would be proper to order particulars before defence, and I think it clearly is a case in which the learned Judge, in the exercise of his discretion, might properly come to the conclusion that it was a case in which the particulars in question should not be ordered until after discovery.

The appeal was therefore dismissed. In the course of his judgment to which Birkett LJ agreed, the Court of Appeal did consider various cases to determine whether there is such a rule that where there is a fiduciary relationship, the plaintiff will not as a rule be ordered to give particulars of matters which are not within his knowledge, but are within the knowledge of the defendant, until he has had discovery. At p. 695, it was held as follows:

> Taking those authorities together, in view of *Waynes Merthyr Co. v. Radford & Co.* [1896] 1 Ch. 29 and *Millar v. Harper*, it seems to me impossible to hold that the practice of refusing particulars until after discovery is limited to cases in which a fiduciary relationship exists between the parties. I think the law on this matter is as stated in the first paragraph of the headnote in the *Waynes Merthyr Co.* case, "The Court will exercise its discretion upon all the circumstances in

each case." A very material circumstance for the Court to consider, in exercising its discretion, is the one referred to by Bowen LJ in *Millar v. Harper*:

> It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars.

In the *Waynes Merthyr* case, it was alleged in para. 5 of the statement of claim that on "divers other occasions" the defendants had taken orders from a particular brewery company and "divers other persons" for coal from the plaintiffs' colliery, and fraudulently supplied coal not purchased from the plaintiffs. The plaintiffs state that they cannot comply with the order for delivery of particulars before discovery. In para. 6 of the statement of claim the plaintiffs gave two instances of firms who have ceased to deal with them as a result of the fraudulent practice of the defendants. The defendants excused themselves by saying that they did not know of this fraud personally, and that it had been committed by one of their clerks, who had already been severely reprimanded. The facts also show that the parties have had friendly business relations for the last 30 years, and the annual quantities of coal purchased from the plaintiffs have decreased during the last years thereby supporting the plaintiffs' case. The defendants also admitted that they would avail themselves of the order to stay proceedings if the plaintiffs do not deliver proper particulars. Hence the plaintiffs' application for discovery before giving particulars on the ground that if they do not get discovery, they will not be able substantially to comply with the order already made, and proceedings will consequently be stayed, and there will be a miscarriage of justice.

At p. 36, Chitty J held as follows:

> I began by saying that this was not a fishing case, but one having a substantial foundation, and it is necessary to go into these details in order to arrive at a just conclusion. The defendants by a careful examination of their books have the means of discovering whether any other frauds similar to those alleged have been committed; the discovery claimed by the plaintiffs is limited to four years from the date of the writ, and it seems to me that this is a case in which, having regard to the position of the parties and the admitted facts, and having regard to the circumstance that many of these alleged frauds are within the defendants' means of knowledge, and are not within the knowledge of the plaintiffs, I think discovery ought to precede particulars, and I think this order should be made for the purpose of effecting justice between the parties, because I see the use which the defendants may be able to make of the order for particulars as originally made in chambers, in which event the plaintiffs might fail to obtain justice. The result therefore is that the order will be varied by directing discovery to precede particulars.

Having carefully perused the authorities on both the factual situations in those cases and the principles of law involved, I had directed the plaintiffs to give particulars before discovery. It is clear that each case had to be considered on its own facts and merits, and the special circumstances surrounding it as in the *Waynes Merthyr* case. There is no general rule that particulars would be refused until after discovery where there is a fiduciary relationship between the parties as was rightly pointed out in *Ross'* case. In as much as it was not pleaded in this case that there was a fiduciary relationship, it was not a matter which I can consider in the plaintiffs' favour.

The plaintiffs had not filed any affidavit in reply to state their grounds for any belief that such acts of misappropriation or breach of trust were perpetrated. Neither had they given any instance of any such acts which led them to allege as they did. No specific charges had been made against the defendants in the statement of claim either. Hence, I hold that this is a case where after carefully looking at all the facts, particulars should precede discovery.

In *Arab Monetary Fund v. Hashim and Others (No. 2)* [1990] 1 All ER the issue arose as to whether the plaintiff was entitled to frame pleadings in general terms and defer particularisation until after discovery. The plaintiff was an international banking organisation and H, the first defendant, was its first director-general. H is reported to have defrauded the fund of about US$50 million. Proceedings were commenced against H claiming damages for dishonest and fraudulent breach of trust, and against his wife, alleging in general terms that she was accountable as a constructive trustee for part of the US$50 million on the ground that with actual or constructive knowledge of H's breach of trust she had assisted in that breach, received trust property and disposed of it, and giving as an instance of Mrs. H's involvement the payment of US$1 million into her Toronto bank account. The Fund obtained, *inter alia*, a worldwide *Mareva* injunction against H and his wife preventing the dissipation of their assets. However, before the Fund's solicitors were able to serve the *Mareva* Order on Mrs. H she flew to Toronto, where she withdrew the balance in her bank account and gave it as gifts to her two sons, in the form of two banker's drafts, and transferred to her younger son the legal title of an apartment she had purchased the previous year. Hoffmann J in deciding whether the Fund's claim ought to be struck out against Mrs. H on the ground that it was not properly pleaded and was lacking in particulars held at p. 679 as follows:

> The mainstream of authority suggests that constructive notice of the breach of trust is insufficient and that there is no such thing as constructive knowledge. What must be shown is conduct showing want of probity by reason either of knowledge of the breach of trust or a deliberate avoidance of such knowledge.

> On the other hand, there are cases which treat a weaker form of knowledge as sufficient and would impose accountability on a non-fiduciary who gave assistance or received trust money with knowledge of facts which would put a reasonable man on notice that there had been a breach of trust. This, I assume, is what was intended by the expression 'constructive knowledge' in the pleading. The state of the authorities is such that I do not think an allegation of liability based on this weaker form of knowledge can for the moment be treated as unarguable.
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> ... This is, in my view, a case in which the Fund is entitled to plead in general terms and to defer particularisation of its case until after discovery: see e.g. *Leitch v. Abbott* [1886] 31 Ch. 374. Of course, by the time the case comes to trial Mrs. Hashim will be entitled to full particulars of the detailed allegations on which the Fund will rely. But the absence of such particulars is not, in my judgment, a ground for striking the claim out now.
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> In the meanwhile, I think that, there is material on which the Fund's Counsel was entitled to plead want of probity.

As alluded to earlier, there was no evidence of any want of probity on the part of the defendants to enable me to exercise my discretion in the plaintiffs' favour. The above case is illustrative of the facts which Counsel for the plaintiff ought to put before the Court before the general pleadings can be allowed to stand or to justify particularisation after discovery. The principle decided in the above case which is that the plaintiff is entitled to plead in general terms and defer particularisation of the allegations until after discovery, provided that there is in the meantime some evidence of conduct on which the plaintiffs are entitled to plead want of probity, cannot be applied in the instant case.

Though the plaintiffs in the instant case have pleaded in para. 13.26 that, "... the plaintiffs will give further and better particulars of the various acts after discovery... ." as in the *Arab Monetary Fund* case, there is, I believe, a material difference, as the learned Judge said at p. 679:

> At the moment the pleading gives certain particulars but they are prefaced by the statement that they are the best that can be given until after discovery.

In the instant case, upon perusal of the pleadings, I hold, upon exercising my discretion, that there are insufficient particulars to enable the defendants to know the basic charges against each of them.

It is expedient and highly desirable that particulars are requested and supplied at this stage instead of at summons for directions stage as both parties would then be able to re-assess their pleadings and have sufficient time to make any necessary amendments. I noted from the case file that the plaintiffs had on 18 April 1996 filed their particulars as ordered by me on 29 March 1996

consisting of three folios. This information will clearly enable the defendants to properly prepare for the trial and to effect justice among the parties. Should the plaintiffs need to make any amendments to their pleadings or to add on further particulars after discovery, they are at liberty to apply.

I therefore held that the 4th-11th defendants are entitled to the particulars sought and ordered the same to be delivered within 21 days from the date of the order, failing which paras. 13-25 of the statement of claim would be struck out. I ordered costs to be in the cause.

I am also not unmindful of instances when a defendant requests for particulars purely as a matter of harassment of the plaintiff or as a fishing expedition. Particulars ought not to be given in every case as of right. It is a discretionary right vested with the Court to be exercised upon a study of the pleadings and the averments in the affidavit in support of the application for particulars.

It is meet and proper at this stage to state that a party seeking particulars should do so pursuant to O. 18 r. 12(1). He should of course make a request for the particulars sought by way of a letter first and if the said request is complied with, there would then be no need for any application to be made to this Court. The opposite party must then furnish the said particulars by way of Form 35 of the RHC. However, if the opposite party refuses to respond to the request for further particulars made pursuant to a letter, then the party seeking particulars must file an application pursuant to O. 18 r. 12(3) with a supporting affidavit giving reasons for seeking such particulars. I take the stand that a party seeking particulars, ought not to seek such particulars by way of O. 25 r. 7 unless by consent or that the particulars sought are so obvious as to be uncontestable. Order 25 r. 7(1) reads:

> Any party to whom the summons for directions is addressed must so far as practicable apply at the hearing of the summons for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action and must, not less than seven days before the hearing of the summons, serve on the other parties a notice in Form 47 specifying those orders and directions insofar as they differ from the orders and directions asked for by the summons.

I draw to mind the words of Slade LJ in *Leal v. Dunlop Bio-Processes International Ltd.* [1984] 1 WLR 874 wherein the learned Judge said at p. 885:

> ... If he cannot properly enter through the front door of O. 6 r. 8, he should not be allowed to enter through the back door of O. 2 r. 1.

Reported by Harjit Singh Pannu &
Gan Peng Chiang